Supreme Court, U.S.
FILED
APR 19 2001
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No. 00-1462

IN THE

Supreme Court of the United States

ADRIENNE LEFKOWITZ,

Petitioner,

v.

THE BANK OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENTS LORETTA M. FINE AND LAUREN FINE

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Petitioner meet the jurisdictional requirement of 28 U.S.C. § 1257 that: "the validity of a statute of any State be drawn into question by the highest court of a State on which a decision could be had on the ground of its being repugnant to the Constitution . . ."?

2. Is the New York Surrogate's Court Procedure Act ("SCPA") § 506 repugnant to the Constitution?

3. Are there any compelling federal issues involved in the hearing by a referee to report the accounting of the Petitioner who was the Executor of a decedent's estate?

TABLE OF CONTENTS

	Page
Counter-Statement of the Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Introductory Statement	1
Statement of the Case	1
Restatement of Facts	2
Reasons for Denying the Writ	5
I. The Petition Fails To Meet The Requirements Of 28 U.S.C. § 1257 Due To The Fact That The Issue Of The Constitutionality Of SCPA § 506 Was Not Drawn Into Question By Any Of The Courts That This Proceeding Was Heard Before.	5
II. The Appointment Of A Private Attorney As A Referee To Conduct A Hearing And Report His Findings And Conclusions To The Surrogate Pursuant To SCPA § 506(1) Is Not Unconstitutional.	11
Conclusion	17

TABLE OF CITED AUTHORITIES

	Page
Adams v. Robertson, 520 U.S. 83, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997)	9
Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)	15
Cleary v. Board of Education of the Binghamton City School District, 243 A.D.2d 949, 663 N.Y.S.2d 374 (3d Dept.1997)	6
Matter of Bennett, 111 A.D.2d 168, 488 N.Y.S.2d 796 (2d Dept 1985), *appeal denied*, 65 N.Y.2d 606, 493 N.Y.S.2d 1028, 483 N.E.2d 134, *certiorari denied*, 106 S. Ct. 178, 474 U.S. 862, 88 L. Ed. 2d 148	6
Matter of Checchia v. Tioga County Board, 231 A.D.2d 752, 647 N.Y.S.2d 298 (3d Dept 1996)	6
Matter of Leslie's Jewelry v. Tax Appeals, 238 A.D.2d 129, 655 N.Y.S.2d 36 (1st Dept 1997)	6
Matter of Rivera v. Cassas, __ A.D.2d __, 713 N.Y.S.2d 689 (2d Dept 2000)	6
Matthews v. Eldridge, 424 U.S. 319 (1976)	13
Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950)	13

Cited Authorities

Page

Street v. New York, 394 U.S. 576 (1969) 8

United States v. Kras, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973) 15

United States v. Raddatz, 447 U.S. 667 (1980) 13

Statutes, Regulations and Treatises:

CPLR § 1012 7

CPLR § 1012(d) 6

Executive Law § 71 ..... 6, 7

SCPA § 506 ..... *passim*

SCPA § 506(1) 4, 11, 14

28 U.S.C. § 1257 ..... i, 1, 5, 11

28 U.S.C. § 1257(a) 1, 5, 7

Other Authoritiy:

McKinney's Practice Commentaries SCPA § 506 by David Siegel and Patrick M. Connors 12

INTRODUCTORY STATEMENT

Petitioner has sought the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a), seeking the grant of a Writ of Certiorari on the basis that SCPA § 506, as applied, is unconstitutional and fails to meet minimal constitutional standards.

The Petitioner argues, *inter alia,* that this matter is of federal importance for the following reasons: (1) a trial held by a private attorney appointed by the court as a referee to report, without consent of the parties, is fundamentally abhorrent to the requisites of the United States Constitution; (2) "the wealthy should be afforded the same due process and equal protection as ordinary citizens"; and (3) due to the deductibility of the fees of an appointed referee, as applied to the United States Estate Tax, SCPA § 506 will cause the federal government to lose revenues

STATEMENT OF THE CASE

The Petition fails to meet the jurisdictional requirements of 28 U.S.C. § 1257 and fails to present any compelling federal reason why this Court should grant a Writ of Certiorari. Therefore, the Petition should be denied. A Writ of Certiorari should not be granted for the following reasons:

1. Due to the fact that the Attorney General of the State of New York was not made a party to the Surrogate's Court proceeding or the Petitioner's appeal to the Appellate Division, review of the constitutionality of SCPA § 506 was barred under New York law and, therefore, the requirement of 28 U.S.C. § 1257 that the validity of a state statute had to have been drawn into question by the highest court of a state in which a decision may be had has not been met.

2. As a result of the Petitioner's failure to effectively raise substantial federal issues in her Briefs to the Appellate Division, the decision of the Appellate Division is silent on the federal questions raised in this Petition to the Court.

3. The Petitioner fails to set forth any substantial argument to the effect that SCPA § 506 is unconstitutional on its face or as applied.

4. The Petitioner fails to present any arguments which set forth any compelling federal issues involved in her Accounting Proceeding.

RESTATEMENT OF FACTS

Nicholas Marsh (the "Decedent") died on March 15, 1988, leaving a will dated May 26, 1983 (the "Will"). His wife, Irene Marsh, executed a mutual will on the same date wherein two trusts were created for the survivor of them (a "Credit Shelter Trust") and (a "Marital Deduction Trust"), with the remainder of each trust passing upon the subsequent death of the survivor as follows: thirty (30%) percent outright to a daughter, Adrienne Lefkowitz (the "Petitioner"), thirty (30%) percent in trust for a daughter, Claudia Appelbaum ("Claudia"), twenty (20%) percent in trust for a daughter, Loretta Fine ("Loretta"), ten (10%) percent in trust for Loretta's daughter, Lauren Fine ("Lauren") and ten (10%) percent in trust for the petitioner's daughter, Julie Lefkowitz ("Julie").

The Decedent's will named Irene and the Petitioner as co-executors, named Irene, the Petitioner and the Bank of New York ("BNY"), as trustees of the Credit Shelter Trust, and named Irene and the Petitioner, as trustees of the Marital

Deduction Trust. The Petitioner was named as the sole trustee of each of the trusts to be created for the benefit of Claudia, Loretta, Lauren and Julie. On October 2, 1986, Decedent executed a codicil to the Will which removed Irene as co-executrix and co-trustee under his will and the Petitioner was named as the sole executrix. By order of the Surrogate's Court of New York County, on or about April 26, 1988, the Petitioner was granted preliminary letters testamentary to administer the estate of Nicholas Marsh (the "Estate").

By notice dated December 20, 1988, a motion was made to remove the petitioner as preliminary executrix. On March 19, 1990, the Surrogate suspended the petitioner's preliminary letters testamentary and ordered an immediate hearing to permanently remove the preliminary executrix. A hearing on her permanent removal was conducted and on April 19, 1990, the Surrogate issued a decision which removed the Petitioner as preliminary executrix and barred her from qualifying as permanent executrix and permanent trustee.

On December 21, 1990, the Petitioner filed a verified petition for an accounting as former preliminary executrix (the "Accounting"). In 1991, BNY filed its objections to the accounting. In July, 1993, BNY filed amended objections to the accounting.

In addition, a proceeding entitled *Application of Shea & Gold, Attorneys for Loretta M. Fine and Lauren Fine, Remainder Beneficiaries of the Estate of Nicholas Marsh, a/k/a Nicholas V. Marsh to Fix their Fees and to Receive Payment of Such Fees from the General Assets of the Estate of Nicholas Marsh* and a proceeding entitled *Application of Greene & Zinnia, P.C., Attorneys for Claudia Marsh*

Appelbaum, remainder beneficiary of the Estate of Nicholas Marsh a/k/a Nicholas V. Marsh to Fix their Fees and to Receive Payment of Such Fees from the General Assets of the Estate of Nicholas Marsh, Deceased (the "Fee Applications") were consolidated with the Accounting proceeding for purposes of the hearing.

The hearings on the Fee Applications and the Accounting took place intermittently from May 11, 1994 through January 3, 1995 before Professor David Rudenstine, who had been appointed *sua sponte* by Surrogate Preminger pursuant to SCPA 506(1). On June 19, 1995, on motion by Referee Rudenstine, with notice to all interested parties, including Petitioner, which motion was unopposed, the Referee requested interim fees. The Surrogate fixed the Referee's interim fees at $108,258.50. Thereafter, pursuant to this order, the Bank of New York, as executor of the estate of Nicholas V. Marsh, made payment of such amount to Referee Rudenstine.

On December 1, 1995, Referee Rudenstine issued a 145 page report which, in part, recommended the Petitioner be surcharged in excess of $1,200,000, plus interest, due to her activities as preliminary executrix. On July 29, 1997, the Surrogate issued a decision that confirmed in part, and rejected in part, the Referee's report. In February, 1998, after a motion to reargue was made by the attorneys for the beneficiaries concerning the rejection of their respective Fee Applications, the Surrogate altered the Referee's recommendation that attorney fees not be issued to the beneficiaries' attorneys and awarded $250,000 to the law firms for Loretta and Lauren, and Claudia. The Surrogate ordered that such fees be paid out of the Petitioner's interest in the Estate.

A decree incorporating the decision of the Surrogate was signed by the Surrogate on April 23, 1998. The New York Appellate Division, First Department, by decision dated October 26, 1999, affirmed the Surrogate's decision. The Appellate Division subsequently denied Petitioner's motion to reargue and denied Petitioner's motion for leave to appeal to the Court of Appeals. The New York Court of Appeals subsequently denied Petitioner's motion for leave to appeal to the Court of Appeals and *sua sponte* denied her appeal as of right for lack of a valid constitutional question.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO MEET THE REQUIREMENTS OF 28 U.S.C. § 1257 DUE TO THE FACT THAT THE ISSUE OF THE CONSTITUTIONALITY OF SCPA § 506 WAS NOT DRAWN INTO QUESTION BY ANY OF THE COURTS THAT THIS PROCEEDING WAS HEARD BEFORE.

28 U.S.C. § 1257(a), under which Petitioner seeks jurisdiction of this Court, states in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, . . . or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution. . . .

The decision of the Appellate Division, First Department in this matter (Petition pp. 3a-5a) contains no discussion concerning the constitutionality of SCPA § 506. Nor is there any mention of the federal issues raised in the Petition for Writ of Certiorari. There are a number of reasons for this, but the primary reason is that under New York law the Appellate Division had no authority to determine the constitutionality of SCPA § 506.

Section 71 of the New York Executive Law and Section 1012(d) of the New York Civil Practice Law and Rules (CPLR") provide that if the constitutionality of a state statute is brought into question, notice be given to the attorney general of the State of New York. The New York courts have consistently held that constitutional challenges to statutes are unreviewable and barred if notice is not given to the New York attorney general sufficient to permit the attorney general to have the opportunity to intervene in the proceedings. *See Matter of Bennett*, 111 A.D.2d 168, 488 N.Y.S.2d 796, (2d Dept. 1985), *appeal denied*, 65 N.Y.2d 606, 493 N.Y.S.2d 1028, 483 N.E.2d 134, *cert. denied*, 106 S. Ct. 178, 474 U.S. 862, 88 L. Ed. 2d 148, *Matter of Rivera v. Cassas*, __ A.D.2d __, 713 N.Y.S.2d 689 (2d Dept. 2000); *Cleary v. Board of Education of the Binghamton City School District*, 243 A.D.2d 949, 663 N.Y.S.2d 374 (3d Dept. 1997); *Matter of Checchia v. Tioga County Board*, 231 A.D.2d 752, 647 N.Y.S.2d 298 (3d Dept. 1996) *Matter of Leslie's Jewelry v. Tax Appeals*, 238 A.D.2d 129, 655 N.Y.S.2d 36 (1st Dept. 1997).

The New York Attorney General was not notified either with respect to the Surrogate's Court proceeding or the Petitioner's appeal to the Appellate Division, First Department. Therefore, Petitioner fails the test of

28 U.S.C. § 1257(a), since a decision with respect to the constitutionality of SCPA § 506 was barred and could not have been determined by either the Surrogate's Court or the Appellate Division, First Department, which was the highest court in which a decision was had, due to the failure to notify the attorney general pursuant to the provisions of Executive Law § 71 and CPLR § 1012.

Second, in the Petitioner's statement contained in the section of the Petition "Where Issues Were First Raised and Preserved" states that the issue of the constitutionality of SCPA §506 was first raised in Petitioner's Brief to the Appellate Division. Since the Petitioner had not raised the issue of constitutionality in the lower court, she had waived her right to raise this issue in the Appellate Division.

Finally, neither the Surrogate's Court nor the Appellate Division, First Department mentioned any constitutional issues in their respective decisions. The third reason that the Surrogate's Court failed to discuss federal issues was that the issues were never raised in the Petitioner's submissions to that Court. A review of the Petitioner's Briefs submitted to the Appellate Division will leave no doubt as to why the Appellate Division made no mention of Petitioner's federal issues. The Petitioner's Brief to the Appellate Division paid merely "lip service" to the federal issues that she now claims to be "compelling federal issues". The table of contents of Petitioner's brief is virtually void of any indication that petitioner is requesting a finding that SCPA § 506 is unconstitutional. The closest the Petitioner comes to this issue is in Point VI which states that: "Appellant was denied her constitutional right to a fair hearing before an appropriate tribunal".

A review of the Questions Presented in Petitioner's Brief would find that of the eight questions submitted by the Petitioner, the only question that raises any federal issue is Question Eight which states: "Was appellant denied her constitutional due process rights to a fair hearing?"

Street v. New York, 394 U.S. 576 (1969) states:

> . . . This Court has stated that when. . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary. *See, e.g., Bailey v. Anderson, supra*; *Chicago, I. & L. R. Co. v. McGuire*, 196 U.S. 128, 131-133 (1905).

This Court has further stated:

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and the aggrieved party bears the burden of defeating this assumption, ibid., by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 451 U.S. 493, 501 (1981). We have described in different ways how a petitioner may satisfy this requirement. *See, Street v. New* York, 394 U.S. 576, 583-585 (1969). In some cases, we have focused on the need for petitioners either to establish that the claim was raised "at the time

> and in the manner required by the state law," *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (quoting *Webb, supra*, at 501), *see*, e.g., *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3 (1983); *Beck v. Washington*, 369 U.S. 541, 549-554 (1962), or to persuade U.S. that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment, *see*, e.g., *Hathorn v. Lovorn*, 457 U.S. 255, 262-265 (1982). In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time," *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); PruneYard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9 (1980). See generally 16B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4022, pp. 322-339 (1996).

Adams v. Robertson, 520 U.S. 83, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997).

Although no state court has passed upon the federal questions raised in her Petition, the Petitioner never even attempted to meet the burden of proof to defeat the assumption that the federal issues were not properly presented to the Appellate Division.

The Petitioner's Brief was seventy pages long, yet the following was the sum total of her "constitutional argument".

"The case law, statutory law, due process, and facts do not support the Surrogate". (Petitioner's Brief p. 14; "PB-14").

"This appeal raises the issue of the legality, indeed the constitutionality, of the appointment of a Referee to Hear and Report . . ." (PB-61).

"If SCPA §506 permits such appointments, it is constitutionally invalid." (PB-61).

". . . the Court's failure to reject the Referee's findings that favored his payor, BNY, will result in the denial of a fair hearing and due process to the Appellant . . ." (PB-64).

"Thus the reference in lieu of a hearing by a Court is of constitutional dimensions." (PB-64).

"In addition to the infirmities set forth above, various rulings and evidentiary errors also denied appellant her constitutional rights to due process and a fair hearing." (PB-64.)

". . . The error of the Referee in not allowing appellant to make motions to quash the trial non party subpoenas duces tecum pursuant to CPLR 2304 deprived the appellant of her constitutional rights to a fair trial, due process, and equal protection of the law . . ." (PB-66.)

"Under all these circumstances it is clear the appellant was denied her constitutional right to a fair hearing and her property was taken from her without due process of law. The due process requirements of the Fifth and Fourteenth amendments apply to state laws." (PB-70). (Unfortunately, the appellant never sets forth what the due process requirements are).

"Appellant's due process rights to a fair hearing before an appropriate tribunal were repeatedly violated." (PB-57)

"Appellant has been deprived of . . . her interest in the estate as a consequence of the constitutionally infirm hearing. This is a 'taking' of property without due process of law." (PB-57).

Based upon her Brief to the Appellate Division, First Department, the Petitioner cannot meet her burden of showing that her federal issues were properly presented.

As a result of the above, the Petitioner has failed to meet the requirements at 28 U.S.C. § 1257, which are necessary for this Court to obtain jurisdiction over this matter.

II.

THE APPOINTMENT OF A PRIVATE ATTORNEY AS A REFEREE TO CONDUCT A HEARING AND REPORT HIS FINDINGS AND CONCLUSIONS TO THE SURROGATE PURSUANT TO SCPA § 506(1) IS NOT UNCONSTITUTIONAL.

SCPA § 506 states in relevant part:

> (1) In any proceeding other than one instituted for probate of a will or where a constitutional right to trial by jury exists and is demanded, the court may appoint a referee to report to the court upon the facts or upon a specific question of fact or upon the law and the facts. The report of the referee shall be filed and contain the facts found and the conclusions of law. No exceptions need be filed to the report.

SCPA § 506 deals with the appointment by the Surrogate of a referee to report, as opposed to a reference to determine. The differences between the two are as follows:

> With a reference to determine, the referee sits as the equivalent of the court itself, . . . , and the referee's judgment or order is final except for appeal. The reference to report is the equivalent of a verdict by an advisory jury: the court can take or leave the report, make new findings at its own option, and decide accordingly.
>
> Under SCPA 506(1), the court may appoint a referee to report on all of the facts, or on a specific question of fact, or on the law and the facts of both. A reference to report may not be employed in any proceeding instituted for the probate of a will or where *a constitutional right to trial by jury exists and is demanded.* (emphasis added). SCPA § 506, McKinney's Practice Commentaries, by David Siegel and Patrick M. Connors.

Contrary to a statement made on page "11" of the Petition, prior usage of SCPA § 506 did not require consent of the parties. The Petitioner has consistently confused paragraph "1" of SCPA § 506 with paragraph "6". Paragraph "6" was added to SCPA § 506 in 1971 and requires consent of the parties in order to appoint a chief clerk, one of the other clerks, a court attorney or any assistant to take testimony in a proceeding. However, whether consent is or is not required, the appointment of a referee or any person other than a judge to hear testimony and report is not, in and of itself, abhorrent to due process or equal protection requisites found in the United States Constitution.

This Court has not made a determination that the appointment of a person other than a judge to hear evidence or make a decision is on its face unconstitutional. The issue raised is always whether or not, within the parameters of that appointment, the due process rights of the parties are protected. "The guarantees of due process call for a hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 313 (1950); *United States v. Raddatz*, 447 U.S. 667 (1980).

> In *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court ". . . emphasized that three factors should be considered in determining whether the flexible concepts of due process have been satisfied: (a) the private interest implicated; (b) the risk for an erroneous determination by reason of the process accorded and the probable value of added procedural safeguard; and (c) the public interest in administrative burdens, including costs that additional procedures would involve;" *United States v. Raddatz*, *supra*.

The Petitioner has not even attempted to discuss how the appointment of a referee in her Accounting Proceeding measured up against these three factors.

The *Raddatz* case was a criminal matter where a magistrate had been appointed to resolve a suppression motion. Even though the resolution of a suppression motion can often determine the outcome of a case, and even though evidence not otherwise admissible at trial may be admissible at a suppression hearing and the disclosure of an informant's identity may not be admissible, this Court held that the defendant's due process rights were protected, even though

a magistrate was appointed over objections of the defendant. This was certainly a circumstance where the protection of the defendant's due process rights, where he could lose his freedom, was far more important than Petitioner's rights as an Accounting fiduciary. Therefore, the Petitioner's interest fails the first part of this test.

Under Section 506(1) of the SCPA, the report and conclusions of the referee have no binding effect. Procedurally, the findings of fact and conclusions of the referee must be confirmed by the Surrogate before the findings have any legal effect. Of course, the Surrogate may disregard all or any part of the referee's findings. In addition, once a decree is entered, the parties have the right to appeal as a matter of right to the Appellate Division.

As a result of this procedure, the Petitioner had two opportunities to object to the referee's procedures, including any due process violations that she believed she had suffered during the hearing. The fact that this particular Referee, or any magistrate or any hearing officer, may improperly conduct a hearing, and, as a result, may compromise an individual's rights, is an issue to be decided on a case by case basis. Because of the safeguards described above, the fact that a particular referee in a particular instance may have violated an individual's due process rights does not mean that the statute itself violates the due process rights of all parties. Therefore, it is apparent that the risk for an erroneous determination by reason of the process set forth in SCPA 506(1) is minimal due to the ability of a party to have input into the Surrogate's decision, to file motions to confirm or reject the report, and to appeal to the Appellate Division. As a result, the Petitioner also fails the second part of the three-pronged test.

The Petitioner cites *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973), for the proposition that there is a due process right of access when fundamental rights are at issue and a State exclusively controls adjusting the legal relationships involved. 409 U.S. at 445. She goes even farther extending this right to the wealthy. However, a review of *Kras* clarifies that this statement cannot be read in a broad context. In fact, in *Kras*, this Court rejected a poor person's right to access to the bankruptcy court for lack of filing fees and clarified that the right to access only applies in circumstances where the state exclusively controls legal relationships. For example, in *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), the parties were too poor to file a petition for divorce and had no other recourse but to obtain a divorce through the courts. As a result, this Court held that the parties could not be kept out of court due to the lack of a filing fee. There are similar decisions with respect to criminal cases and welfare cases.

The Petitioner also argues, once again, citing *Boddie*, that ". . . the statute or rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure and act is a legitimate exercise of state power is beyond question." 401 U.S. at 379. However, in quoting from *Boddie*, the Petitioner fails to include the second sentence in that paragraph, which indicates that the sentence cited only applies in cases involving religious freedom, free speech or assembly. The next sentence states: "Thus, in cases involving religious freedom, free speech or assembly, this court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights". This procedure would not be applied in determining the constitutionality of a state

statute based on the fact that one individual at one hearing was not given his or her full due process rights in an estate accounting proceeding.

It should be pointed out that the hearings which took place with respect to the Accounting were held over a period of more than six months and took up more than 18,000 pages of transcripts. Certainly, the petitioner had a substantial opportunity to be heard.

The balance of the Petitioner's argument contain specific instances in which she felt that she was wronged and her due process rights were violated. Once again, *assuming arguendo*, that her due process rights were violated, the Petitioner had ample opportunity to be heard with respect to her motion to confirm, to reject the referee's findings, her motion to reargue the referee's findings, her appeal to the Appellate Division, First Department, her motion to reargue to the Appellate Division, First Department and her motions for leave to appeal to the Court of Appeals as well as her attempt to appeal as of right to the New York City Court of Appeals. Certainly, she has had adequate opportunity to protect her rights.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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